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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 400

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, *et al.*

Petitioners,

v.

SCHERER & SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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SCHERER & SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Florida entered in the above entitled case on February 20, 1967, dismissing the appeal to that court.

Opinions Below

The order of dismissal of the Supreme Court of Florida is unreported. The opinion of the District Court of Appeal is reported in 188 So. 2d 380. The final decree of the circuit court and its order denying rehearing are unreported.

There are also earlier opinions in this case as follows: District Court of Appeal, reported in 163 So. 2d 306; Supreme Court of Florida, reported in 142 So. 2d

290, implemented by decision of District Court of Appeal, reported in 146 So. 2d 137; and District Court of Appeal, reported in 132 So. 2d 359.

For the convenience of the Court, the opinions are reprinted in Appendix A, *infra*, pp. A 1-41.[1]

Jurisdiction

The order of dismissal of the Supreme Court of Florida (*infra*, p. A 1) was entered on February 20, 1967. By orders of Mr. Justice Black, the time for filing a petition for writ of certiorari was extended to June 22, 1967, and then to July 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the Florida state courts are barred by controlling preemption decisions of this Court from issuing an injunction, under its "right-to-work" law, enjoining peaceful picketing and banning enforcement of a garment industry contractual provision which forbids work to be contracted to non-union shops.

2. Whether the garment industry's exemption contained in Section 8(e) of the National Labor Relations Act may be superseded by a state "right-to-work" law.

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[1] We have not reprinted 146 So. 2d 137, wherein the District Court of Appeal merely modified its mandate to conform to the Supreme Court decision in 142 So. 2d 290.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Florida Constitution are set forth in Appendix B, *infra*, pp. B 1-4.

Statement

In 1957, Local 415 of the International Ladies' Garment Workers' Union, AFL-CIO (the Union), entered into a collective bargaining agreement with the Florida Apparel Manufacturers' Association (R. 27-50, 291, 294, 311). On October 25, 1960, the agreement was modified and renewed by a Supplemental Agreement (R. 23-26, 213-216, 250, 291). Paragraph 6 of the Supplemental Agreement provided as follows (R. 25, 215-216):

> "6. Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments, etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the Union, the International or affiliates thereof. In case a member of the Association shall have this work done by a non-union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-union shop or shops."

The Union demanded and secured this provision "to make sure that * * * working conditions are at a level" which would "defend the standards of our members" (R. 293-294).

Scherer & Sons, Inc. (Scherer) is a non-union manufacturer of belts, buttons and accessories (R. 256, 337, 391). When some Association members continued to subcontract belt and accessory work to Scherer despite the prohibition in the Supplemental Agreement, the Union threatened to invoke the agreement against them unless they desisted (R. 149, 152, 229, 230, 300, 407). Thereupon, on February 10, 1961, Scherer instituted the instant suit in the Florida state courts under the state antitrust statutes, Florida Statutes, Section 542.05 (R. 15-18). Scherer promptly secured an injunction against the attempted enforcement of Paragraph 6 (R. 57-58) which remained in effect for a year and a half until it was overturned by the District Court of Appeal, 132 So. 2d 359 (R. 72-74, *infra*, pp. A 29-31) and the Supreme Court of Florida, 142 So. 2d 290 (R. 81-90, *infra*, pp. A 18-28).

Both appellate courts held that, since interstate commerce was concededly involved (R. 303, 306-307), the subject matter of the suit under the state antitrust statute was preempted by the National Labor Relations Act.

The Florida Supreme Court did not, however, order dismissal of the complaint. Instead it remanded the case to the courts below to determine whether relief should be granted under Florida's so-called "right to work amendment" found in Section 12, Declaration of Rights, Florida Constitution (*infra*, p. B 3).[2] The Supreme Court stated (142 So. 2d, at 295; *infra*, p. A 27):

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[2] The District Court of Appeal conformably modified its mandate to embody the remand, 146 So. 2d 137.

> "Conceivably, the secondary economic pressures exerted upon appellant by the disputed provision in the collective bargaining agreement could force appellant into a dilemma which would be tantamount to a taking of its property without due process. It could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be the compulsion to require its employees to join a union as a condition to employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action. In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states."

The injunction having been thus vacated by the Florida Supreme Court, the Union in October 1962 again attempted to enforce Paragraph 6 (R. 150, 151, 153, 227, 228, 231, 332, 346). At this point Scherer countered in a number of ways. First, it commenced another antitrust suit attacking Paragraph 6, this time in the United States district court, on a claim of Sherman Act violation. The suit was ultimately defeated.[3] Second, in addition to the federal suit, it filed unfair labor practice charges against the Union with the National Labor Relations Board, based on

[3] The district court dismissed the complaint after trial, and its decision was affirmed by the Fifth Circuit, 341 F. 2d 298. This Court denied certiorari, 382 U. S. 820, No. 188, October Term, 1965.

the execution and attempted enforcement of Paragraph 6. These charges were dismissed, the determination being based in part on "the impact of the second [garment industry] proviso to Section 8(e) of the Act" (R. 114).[4] And third, as permitted by the remand from the Florida Supreme Court, Scherer amended its state court complaint to allege a violation of the Florida "right-to-work" provision of the state Constitution (R. 92-94, 99).[5]

But before the "right-to-work" complaint could be brought to trial, two definitive decisions of this Court supervened, *Local No. 438* v. *Curry*, 371 U. S. 542; *Retail Clerks International Ass'n* v. *Schermerhorn*, 375 U. S. 96. Upon these controlling authorities, the Union moved to dismiss the complaint and the trial court granted the motion (R. 109, 112, 324, 326). The District Court of Appeal, however, ignoring the *Curry* and *Schermerhorn* decisions, reversed, stating that the court below had "erred in failing to adhere to the decision of the Supreme Court of Florida" which had

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[4] The relevant papers are printed as part of Scherer's reply brief in the Fifth Circuit and certified to this Court at Scherer's instance in No. 188, October Term, 1965.

[5] Even this does not exhaust Scherer's bag of litigation. At an earlier stage it ordered and induced its workers to commence a group injunction suit against Union picketing, *Kitchens* v. *Doe*, the action being entitled in the name of a floorlady, Nellie Kitchens. Scherer supplied its own counsel to represent the employees without charging them any fee. The ultimate result of this litigation is discussed *infra*, pp. 7-8.

Upon charges filed with the National Labor Relations Board against Scherer based on its coercion of workers to join in the *Kitchens* lawsuit, the Board found a violation of the Act. The court of appeals enforced the Board's remedial order with certain modifications, 370 F. 2d 12 (C. A. 5), and the matter is now pending before this Court on Scherer's petition for certiorari, No. 1397, October Term, 1966.

become "the 'law of the case'" (163 So. 2d 306, R. 177, *infra*, p. A 17).

The case then proceeded to trial (R. 318-410), and on March 12, 1965, the court entered a final decree in favor of Scherer (R. 197, *infra*, pp. A 11-14). As had the District Court of Appeal on the prior appeal, the court now disregarded the *Curry* and *Schermerhorn* cases, considering itself bound by "the law of the case in this cause of action, as is defined and set out in 142 So. 2d 290 and 163 So. 2d 306" (*infra*, p. A 12). It concluded that enforcement of "the contract which is the subject matter of this suit" [Paragraph 6, *supra*, p. 3] constituted illegal "economic pressures" to compel Scherer "to execute a contract" with the Union and "require [its] employees to join" the Union; and that this violated the "right-to-work" provision of the Florida Constitution (*infra*, pp. A 12-13). The court not only enjoined enforcement of Paragraph 6, but also enjoined peaceful picketing as violative of the "right-to-work" provision (*infra*, pp. A 13-14).[6]

Meanwhile, the aforementioned *Kitchens* case, the Scherer-induced "employee" suit to enjoin Union picketing as violative of the "right-to-work" provision (*supra*, p. 6, n. 5) reached the District Court of Appeal. In this case, unfettered by any "law of the case" considerations, the District Court of Appeal proceeded to hold that the *Schermerhorn* decision of this Court had superseded the Florida Supreme

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[6] The court cited in support an earlier Florida decision, *Hescom, Inc.* v. *Stalvey*, 155 So. 2d 3 (*infra*, p. A 12). Compare p. 8, *infra*.

Court's contrary views in the *Scherer* case. It accordingly decided that preemption applied and required the dismissal of the *Kitchens* complaint. 172 So. 2d 896 (*infra,* pp. A 37-41). In so doing, it also held that the Florida *Hescom* case (*supra,* p. 7, n. 6) "must be deemed overruled by the later Schermerhorn case" (*infra,* p. A 41).[7]

Relying on the *Kitchens* decision, the Union sought rehearing of the instant case in the trial court (R. 196-201). Rehearing was denied (R. 217-219, *infra,* pp. A 6-10). The Union then appealed to the same District Court of Appeal which had just decided the *Kitchens* case in its favor. But this time the District Court of Appeal, making no mention of *Kitchens* and totally ignoring preemption and the *Schermerhorn* case, simply quoted from and affirmed the decision of the trial court (188 So. 2d 380, *infra,* pp. A 2-5). It also cited approvingly the very *Hescom* case which not long ago it had held to be "overruled by the later Schermerhorn case".

The Union's further appeal to the Supreme Court of Florida was dismissed on February 20, 1967 (*infra,* p. A 1).[8]

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[7] The Supreme Court of Florida subsequently dismissed an appeal in the *Kitchens* case, 194 So. 2d 258 (*infra,* pp. A 32-36).

[8] The jurisdiction of the Supreme Court to hear the appeal under the Florida Constitution seems plain (*infra,* p. B 4; see also p. A 33).

Reasons for Granting the Writ

1. The decision below flies directly in the face of the preemption decisions of this Court from *Garner* v. *Teamsters Union*, 346 U. S. 485, onward. In the *Garner* case, as here, the "courts below found" that the "purpose" of the union's peaceful activity "was to coerce [the employers] into compelling or influencing their employees to join the union" (346 U.S., at 487). Nevertheless, this Court held that the National Labor Relations Board had exclusive jurisdiction over the controversy and that the state courts were preempted from acting.

The *Garner* case arose in a commonwealth which had no "right-to-work" law enacted pursuant to Section 14(b) of the National Act (*infra*, p. B 3), but this Court has applied exactly the same doctrine in states which do have such laws, overturning judgments which sought to rest state jurisdiction thereon. *Farnsworth and Chambers Co.* v. *Local Union 429*, 353 U. S. 969, reversing 201 Tenn. 329; *Local No. 438* v. *Curry*, 371 U. S. 542, reversing 217 Ga. 512; *cf. DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U. S. 498, reversing 77 S. D. 273. In *Retail Clerks International Ass'n* v. *Schermerhorn*, 375 U. S. 96, the Court spelled out the distinctive point at which state right-to-work jurisdiction first comes into play. It held (at p. 105):

> "state power, recognized by § 14(b), begins *only with actual negotiation and execution of the*

> *type of agreement described by § 14(b).* Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board". (italics in original)

In the instant case there is no suggestion that the Union ever negotiated or executed the type of agreement described by Section 14(b), i.e., one requiring Union membership as a condition of employment.[9] In these circumstances, the instant decision flatly conflicts with *Schermerhorn* and the other cited decisions of this Court.

Indeed the District Court of Appeal itself recognized in the *Kitchens* case that *Schermerhorn* required dismissal of that complaint, despite the earlier conflicting view of the Florida Supreme Court in the first round of the *Scherer* case (*supra,* pp. 7-8). Yet some misguided notion of "law of the case", in disregard of the Supremacy Clause, caused the court in the instant case to defer to the Florida Supreme Court instead of following this Court's controlling view. It thereupon issued an injunction, under the "right-to-work" law, enjoining peaceful picketing and banning enforcement of the contractual provision which forbids work to be contracted to non-union shops. The judgment below plainly collides with the authoritative decisions of this Court and disregards

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[9] The only agreement ever submitted to Scherer, years before this litigation began, was one on which no negotiations ever took place and which did *not* require membership as a condition of employment unless "State Law permits" (R. 234, 341-342, 348-352, 392-393, 394-395, 398).

the preemption doctrine which divests the state of jurisdiction.

2. If the decision below is permitted to stand, then the garment industry exemption from the hot cargo prohibitions of Section 8(e) of the National Act will be null and void in Florida. It will have been ousted by the state's "right-to-work" law. The same result would seem to follow in other "right-to-work" states. This cannot be reconciled with the Congressional purpose.

For decades before 1959, when Congress passed the Landrum-Griffin amendments to the National Labor Relations Act, the garment industry agreements contained provisions that a union employer must confine his production to union factories and not divert them to non-union sources lest they undermine and destroy the standards in the union factories. Congress in 1959 clearly intended to preserve the legality of such provisions. As the Fifth Circuit has said, it was the "intent and design of Congress to protect an industry peculiarly subject to poor working conditions", one which "was formerly a sweat shop industry", and one in which "vast improvement in working conditions * * * was brought about through agreements between jobbers and the unions requiring the jobbers to farm out their work only to contractors operating on union standards", lest there be "havoc". *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20; see also *NLRB* v. *Amalgamated Lithographers of America*, 309 F. 2d 31 (C.A. 9), cert. den. 372 U. S. 943; *Truck Drivers Local No. 413* v. *NLRB*, 334 F. 2d 539 (C.A. D.C.).

There is not the slightest intimation in the legislative history that Congress intended the garment industry exemption to apply in the rest of the United States, but desired "havoc" in Florida and the other "right-to-work" states.

The simple fact is that Section 14(b) of the National Act, and appropriate "right-to-work" laws enacted pursuant to its authority, have nothing to do with the garment industry exemption nor, for that matter, with the basic hot cargo prohibitions of Section 8(e). It is the National Labor Relations Board under the National Act, not the states under their "right-to-work" laws, which has exclusive authority to define, apply and enforce the prohibitions and protections embodied in Section 8(e). Indeed, in the instant situation, as has been mentioned, Scherer did turn to the Board for relief, and its unfair labor practice charges were dismissed, the Board citing the garment industry proviso as one reason (*supra,* pp. 5-6). The State of Florida has no authority to supersede this determination through a distorted use of its "right-to-work" law.

The only proper use of the state's "right-to-work" law is to ban "actual negotiation and execution of the type of agreement described by § 14(b)" (*Schermerhorn, supra,* p. 9)—i.e., an agreement "requiring membership in a labor organization as a condition of employment." There was no hint here of even a demand for—much less "actual negotiation and execution of"—the forbidden type of agreement. In these circumstances the state courts had no jurisdiction to issue an injunction banning the vital "union-work"

provisions which garment industry agreements have long contained.[10]

To preserve the garment industry exemption throughout the nation, as Congress intended, certiorari should issue to review the judgment below.

Conclusion

For the reasons stated, the writ of certiorari should be granted.

Respectfully submitted

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[10] It might be added that in "right-to-work" states, while the Union's collective agreements do not contain provisions requiring membership as a condition of employment, and significant numbers of workers in the shops are sometimes non-union, the shops and workers are nevertheless "covered by collective bargaining agreements with the Union" (Paragraph 6, *supra*, p. 3), with the result that union manufacturers and jobbers can properly send work under their contracts to such shops. Stated another way, compulsory union membership and coverage by a collective agreement are two quite different things; only the latter is needed to satisfy the "union-work" provisions of the manufacturer's or jobber's agreement.